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No.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1984

ROYAL VON PUCKETT, PETITIONER,

vs.

THE CITY OF EMMETT, IDAHO, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States

From the Ninth Circuit Court of Appeals

Vernon K. Smith
Counsel of Record
1900 Main Street
Boise, Idaho 83702
Phone No. (208) 345-1125

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The City of Emmett, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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To the Honorable, the Chief Justice
and Associate Justices of the
Supreme Court of the United States.

Royal Von Puckett, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgement of the Ninth Circuit Court of Appeals entered in the above-mentioned case on September 28, 1984, and that Order denying Petition for Rehearing filed November 5, 1984.

(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether Officer Puckett has been deprived of his protected property rights and liberty interests as provided for by Law.

2. Whether Officer Puckett was guaranteed procedural property rights and liberty interests under the Policy and Procedure Manual used by the City, protecting

EDITOR'S NOTE

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him from falsehoods and entitling him to due process hearings.

3. Whether the use of Puckett's personnel file in Federal Court was privileged use and whether the City engaged in a lawful defense of the Rhoton lawsuit.

4. Whether the disseminated information was false and stigmatizing.

5. Whether the Court of Appeals erred in denying Puckett's Petition for Rehearing.

(b) PARTIES TO THE PROCEEDING

The Parties to this Proceeding is Cross-claimant-Appellant, Royal Von Puckett, and the City of Emmett and its officials, State of Idaho, Crossdefendant-Appellee.

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(c) TABLE OF AUTHORITIES

1. CONSTITUTION

Due process clause of the 14th Amendment of the U.S. Constitution;

2. STATUTES

Title 42 USC §1983;

3. UNITED STATES SUPREME COURT CASES

a) Anti-Fascits Committee v. McGrath, 341 US 123, 95 L. Ed 817, 71 S Ct 624;

b) Bishop v. Wood, 426 US 341, 48 L. Ed 2d 684, 96 S Ct 2074 (1976);

c) Board of Regents of State Colleges v. Roth, 408 US 564, 33 L. Ed 2d 548, 92 S Ct 2701 (1972);

d) Cawley v. Velger, 427 US 904, 49 L. Ed 2d, 97 S Ct 3188 (1976);

e) Codd v. Velger, 429 US 624, 51 L. Ed 2d 92, 97 S Ct 882 (1977);

f) Gagnon v. Scarpelli, 411 US 778, 37 L. Ed 2d 656, 93 S Ct 1756 (1973);

g) Groppi v. Leslie, 404 US 496, 30 L. Ed 2d 632, 92 S Ct 582, (1972);

h) Monell v. Dept. of Social Service, 436 US 658 (1978);

i) Morrissye v. Brewer, 408 US 471, 33 L. Ed 2d 484, 92 S Ct 2593 (1972);

j) Paul v. Davis, 424 US 693, 47 L. Ed 2d 405, 96 S Ct 1155 (1976);

4. FEDERAL COURT CASES

a) Black v. Stephens, 662 F. 2d 181 (1981);

b) Detz v. Hoover, 539 F. Supp 532 (1982);

c) Edmonds v. Dillon, 484 F. Supp 722 (1980);

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e) Himmelbrand v. Harrison, 484 F. Supp 803 (1980);

f) Levine v. West, 541 F. Supp 741 (1982);

g) McKinley v. City of Eloy, 705 F. 2d 1110 (1982);

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j) Turpin v. Mailet, 619 F. 2d 196 (1980);

k) Van Ooteghaem v. Gray, 628 F. Supp 686 (1979);

l) Villa v. Franzen, 511 F. Supp 231 (1981);

(d) OPINIONS BELOW

The unofficial report and Memorandum opinion of Ninth Circuit Court of Appeals was filed and entered September 28, 1984, affirming the Order granting Summary Judgment for the City of Emmett; Petition for Rehearing was filed by Appellant, October 10, 1984, and Order of denail filed November 5, 1984; Judgment was affirmed as reflected in the Ninth Circuit Court of Appeals Mandate November 13, 1984, and filed in the District Court November 19, 1984.

(e) STATEMENT OF JURISDICTION

(i) The Memorandum Decision was filed September 28, 1984; affirming the Order granting Summary Judgment in the District Court; Petition for Rehearing was timely filed and denial filed November 5, 1984; Judgment was certified November 13, 1984, by Mandate of the Court of Appeals Clerk, and filed of record in the District Court on November 19, 1984, at 8:34 A.M. as the final Judgment of the Court of Appeals.

(ii) Petition for Rehearing was filed October 10, 1984, and Order denying same was filed November 5, 1984, in the Clerk's office of U.S. Court of Appeals. There has been no Petition requesting an extension of time within which to Petition for Certiorari.

(iii) Not applicable

(iv) 28 USC §2101(c)

(f) CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

1) The Due process clause of the 14th Amendment of the United States Constitution;

2) Title 42 USC §1983

(g) STATEMENT OF THE CASE

The events creating this Federal case began April 10, 1979, when Puckett, an Emmett City Police Officer, while on routine patrol, observed a vehicle with cancelled plates. The Rhotons, being the registered owners of the vehicle, had been convicted for failure to maintain insurance and their plates had been cancelled.

Puckett confirmed the cancellation by radio with the Department of Law Enforcement and stopped the vehicle. Puckett intended to give a written warning only, but as conversation ensued, the Rhotons admitted the plates were cancelled, and stated they would not comply with the law and were not concerned about the notice of cancellation. Knowing voluntary compliance was out of the question and a warning meaningless, Puckett decided to issue a citation. The passenger in the vehicle, Audrey Rhoton, became argumentative and declared she would not get a registration or comply with the law. Puckett informed her and David, her son, who was operating the vehicle, that he was required to issue a citation and they could explain their position to the Magistrate. Puckett asked for David's driver's license and cancelled registration in the glove compartment. While proceeding to write the citation, Audrey Rhoton grabbed the license from Puckett and ran from the vehicle.

Puckett warned her to return but she continued to run. Needing the license to issue a citation, Puckett pursued Audrey for one block. As he approached her, she raised her left fist to hit him; he grabbed her hand, during which time he was kicked, scratched and bitten. He attached handcuffs, informed her she was under arrest for obstructing and delaying him in the performance of his duties. David arrived at the location, grabbed Puckett by the shoulder and he was then informed by Puckett he was under arrest for operating the vehicle with cancelled plates, and the two were escorted to Jail.

Thereafter, without notice to Puckett; the citation was dismissed on July 24, 1979, upon motion of the City Attorney, Louie Gorrono. Mr. Gorrono informed the Magistrate Puckett wanted the matter dropped, which was not true, causing concern to Puckett and Lieutenant Mike Priest. Puckett conferred with his superior, Priest, who was Chief pro-tem, as

the official Chief, Russell Scott, had failing health, and was frequently absent from his duties. Puckett and Priest discussed the dismissal and dissatisfaction with the frequent ease by which Mr. Gorrono would dismiss citations. Puckett came to learn that Mr. Gorrono had sent a copy of a letter to the Police Station with comments written in, supporting the actions of the Officer, but indicated the desire to avoid unnecessary litigation and he would not prosecute the case. Priest told Puckett, "looks like Gorrono is going to drop another one". When Puckett discovered Mr. Gorrono said the Officer wanted it dropped, Puckett informed Priest it was a lie, as he did not want charges dropped.

Priest and Puckett decided Puckett should go see the Gem County Prosecutor, Bry Behrmann, and treat the matter as a standard case. Puckett had a zerox copy of the letter from Mr. Gorrono, which said the police were correct, but he was not going to prosecute. Priest

instructed Puckett to leave the letter out and send the offense report only, just like a standard case. Puckett told Behrmann they were not getting support and "if you review the case, see what you think".

Puckett returned to Behrmann's Office, took the prepared documents and went to the Magistrate on duty. The probable cause hearing was conducted before the Judge then available. During the hearing, Puckett informed the Court it was his understanding the case had been dropped. The Court, being fully aware of that event, deemed it appropriate to issue warrants for the arrest of David and Audrey Rhoton, and they were arrested that day, August 19, 1979. On August 20, 1979, a meeting was held and Puckett was placed on probation, without hearing and no formal investigation by City officials, and only as a result of the events involving that arrest. The disciplinary action was conducted by the Mayor, Council members, and with the

approval of Russell Scott the official Chief, and Priest, as the Chief pro-tem. Prior to the meeting, Puckett was instructed by Priest to say nothing, as Priest advised him any statements would be detrimental to both of them, cause embarrassment to the Department, jeopardize Priest's prospects for becoming Chief and cause official investigation. The written document creating the term of probation provided therein that at the expiration of six months the entire matter would be stricken from Puckett's record and dropped without further notice.

Puckett's involvement in the arrest came about because he had conferred with his superior, Priest, who instructed him to pursue the Rhoton case with the Gem County Attorney, all of which was done in the course of his employment and instruction; Puckett had no knowledge of Idaho Law concerning dismissal of misdemeanor charges under Idaho Code §19-3506.

Upon expiration of the six month probation, Puckett requested confirmation the record had been stricken, but was informed by Priest the City officials would not strike the proceeding and the action would remain in his file for use as the City's defense to the threat of a civil rights action made by the Rhotons. Priest stated the City officials had no intention of keeping their word and Puckett would be terminated if he sought to contest the matter further.

The disciplinary action was entered falsely and wrongfully and created a stigmatizing effect of Puckett's rights to employment, causing defamation to his good name and impuned his character as a good police officer. The action was conducted without hearing or investigation and the wrong was never corrected.

Puckett made demands of his superiors, including Russ Scott, Priest and Council members, to remove the probation action; Scott stated he was no longer Chief and could

not force its removal.

Both before and after Rhotons filed suit in Federal Court, Puckett was informed by the Mayor, Chief and City Attorney that he would be provided legal defense by the City without cost. After Puckett was served the Complaint in April, 1980, he made demands upon the City for legal representation and none was forthcoming, requiring Puckett to obtain private counsel, to prevent default.

In April, 1980, Puckett also spoke out and complained of this further breach of promise. Because of that vocal disenchantment, he was suspended without hearing on May 29, 1980, and fired without hearing or investigation on June 2, 1980. Puckett's file then included the disciplinary action, suspension and termination.

These events involved the Mayor, Council members and Priest; the suspension and termination were effectuated through the instrumentality

of Priest, with his delegated authority from the Mayor, acting within the scope and pursuant to his power as Chief and as instructed.

Puckett made application for unemployment compensation, but the City answered and said he was discharged for inability to follow instructions, poor attitude towards the public, inability to follow and absorb Department regulations and gross insubordination. For the stated reasons by the City Puckett was denied his benefits for the false reason of employee misconduct. He was told by Priest the City would see to it he never worked in Law Enforcement or employed as a Police Officer again. He appealed the decision and scheduled a redetermination hearing for August 22, 1980. Puckett and his private counsel subpoened the Personnel Manual on file with the City Police Department and represented to be in effect at the time of these discipline actions. On August 22, 1980, Puckett and Counsel were personally handed the Manual by Chief Priest at the Emmett City Police Department.

Before the hearing, Puckett's Counsel and

the City attorney decided to resolve the dispute, although the conditions of resolution are genuinely disputed. It was understood by Puckett's Counsel a resolution meant the absolute removal of all documentation that had been placed in his file.

The documents or copies of them, however, remained in his file. During the proceedings in the Federal case, there was reference to material contained in documents still in his file which stated Puckett was disciplined, all of which material and reference was to have been stricken. It was false in content and wrongfully disseminated and publicized in local news release editions and circulations who publicized the events and proceedings of the Federal suit.

The disclosure by the City of any disciplinary action was known to be false and a misstatement of fact since Puckett had been exonerated by the investigation conducted by the City and reported formally on the 29th day of September, 1980. Russell Scott, Chief of Police until October 1, 1979, states the disciplinary action

was in error, a mistake, and action should have been taken to correct the disciplinary action.

Once Puckett became aware of this unlawful reference to material wrongfully retained in his file on January 22, 1981, he realized the City had not corrected his file, and could see the City had acted in bad faith and failed to come forth and strike the false and defamatory material from his record. He concluded he had a cause of action for violation of his property rights and liberty interests, and filed his Crossclaim on October 13, 1981, approximately nine months after the wrongful reference to and dissemination of the disciplinary proceedings. The City's position is froth with error as Mr. Gorrono says:

> "There is no convenant that Chief Priest could not keep a copy in his own private file to protect the record of what had been done. His office copy reappeared in the files after claim against the City by Puckett and judicial proceedings required production of such records. (See Cl. Rec. Doc. #162, P.3).

That statement in the record is blatently false because:

1. The disciplinary action was initially wrong and a mistake. (See Russell Scott's Deposition dated May 3, 1983).

2. The investigation confirmed Officer Puckett conferred with his superiors. (See Cl. Rec. Doc. #150, Exhibit "R" attached).

3. Puckett's Counsel confirmed by Affidavit there was an absolute convenant no copies were to be retained in any files anywhere and everything stemming from the Council meeting of August 20, 1979, was to be stricken. (See Cl. Rec. Doc. #151, 173 and 175).

4. The disciplinary action was to be destroyed. (See Russell Scott's deposition dated May 3, 1983).

5. There was no request for production of documents until after dissemination of the disciplinary matters in Puckett's personnel file on January 22, 1981.

The City had the obligation to correct the falsehoods and wrongs by virtue of the official investigation on September 29, 1980. The City failed to correct the errors, and in furtherance of their bad faith, used his discipline and termination as their defense to the Rhoton case.

The City maintained the termination with full knowledge of all facts stemming from the

September investigation.

That action by the City caused Puckett to consider his right for future employment and reinstatement for the due process violations that occured. He elected to file his Crossclaim on October 13, 1981, because of the deprivation of his procedural property rights and violations of his liberty interests.

The original action in Federal Court was settled by the insurance carrier, leaving Puckett's Crossclaim against the City. Officer Puckett did not sue Priest personally as the remedy he sought was reinstatement of his employment and removal of documents or reference to materials wrongfully placed in his file. That action placed the burden on the City to correct their errors, if acting in good faith, but the City refused and maintained the firing in his record.

(h) Not Applicable

(i) THE FEDERAL COURT HAD JURISDICTION OVER THE SUBJECT MATTER PURSUANT TO THE FOLLOWING:

1. CONSTITUTION

Due process clause of the 14th Amendment of the U.S. Constitution;

2. STATUTES

Title 42 USC §1983;

3. UNITED STATES SUPREME COURT CASES

a) Anti-Fascits Committee v. McGrath, 341 US 123, 95 L. Ed 817, 71 S Ct 624;

b) Bishop v. Wood, 426 US 341, 48 L. Ed 2d 684, 96 S Ct 2074 (1976);

c) Board of Regents of State Colleges v. Roth, 408 US 564, 33 L. Ed 2d 548, 92 S Ct 2701 (1972);

d) Cawley v. Velger, 427 US 904, 49 L. Ed 2d, 97 S Ct 3188 (1976);

e) Codd v. Velger, 429 US 624, 51 L. Ed 2d 92, 97 S Ct 882 (1977);

f) Gagnon v. Scarpelli, 411 US 778, 36 L. Ed 2d 656, 93 S Ct 1756 (1973);

g) Groppi v. Leslie, 404 US 496, 30 L. Ed 2d 632, 92 S Ct 582, (1972);

h) Monell v. Dept. of Social Service, 436 US 658 (1978);

i) Morrissye v. Brewer, 408 US 471, 33 L. Ed 2d 484, 92 S Ct 2593 (1972);

j) Paul v. Davis, 424 US 693, 47 L. Ed 2d 405, 96 S Ct 1155 (1976);

4. FEDERAL COURT CASES

a) Black v. Stephens, 662 F. 2d 181 (1981);

b) Detz v. Hoover, 539 F. Supp 532 (1982);

c) Edmonds v. Dillon, 485 F. Supp 722 (1980);

d) Hearn v. Crainesville, 668 F. 2d 1328 (1982);

e) Himmelbrand v. Harrison, 484 F. Supp 803 (1980);

f) Levine v. West, 541 F. Supp 741 (1982);

g) Mckinley v. City of Eloy, 705 F. 2d 1110 (1982);

h) Means v. Chicago, 535 F. Supp 455 (1982);

i) Pennsylvania v. Porter, 480 F. Supp 686 (1979);

j) Turpin v. Mailet, 619 F. 2d 196 (1980);

k) Van Ooteghaem v. Gray, 628 F. Supp 686 (1979);

l) Villa v. Franzen, 511 F. Supp 231 (1981);

(j) ARGUMENT FOR GRANTING WRIT:

Question 1: Whether Officer Puckett has been deprived of his protected property rights and liberty interests as provided by Law.

The City wrongfully disciplined Puckett on August 20, 1979; and later wrongfully suspended and fired him without hearing to determine facts in compliance with due process methods and the

Policy and Procedure Manual. The discipline, without hearing, was entered in his personnel file with officials promising to strike the matter completely from his employment record within six months. That was never done, and when Puckett began to reveal facts about the events that occured, the wrongful discipline, his conference with his superior, and his actions being within the scope and course of his employment) he was then fired and the Procedural Mandates completely suppressed to prevent publicity. The Chief falsified matters against Puckett with City approval, as the Chief and City officials banded together against Puckett to use him as their defense to the civil rights action lingering in the wind, as such discipline could be used to sidestep any claims of policy conduct by the City to re-arrest the Rhotons.

The City deliberately and wrongfully kept the discipline in his record and entered the firing, along with absolutely false and stigmatizing reasons of discipline and termination,

in his personnel file without opportunity of name clearing hearings required by the Federal case authority. The stated reasons for the termination alone were false and did severely affect one's impressions as they would review his record for employment purposes. There could be no reasonable expectation of employment without releasing information from one's personnel record, and Puckett, being without opportunity to prevent the wrongs and falsehoods from entering his record, could not prevent the release of information from his records to prospective employers, when pursuing employment. The material and information in his file prevents and will continue to prevent future employment, and the crime being committed stems from the fact the material is false. The original discipline of August 22, 1980 was a mistaken error; it was declared to be error by the Chief of Police, Russell Scott and confirmed to be such by official investigation of September 29, 1980. The report said

"all previous City action and inferences were to be rescinded". That clearly means a violation of that decision serves to allow false statements and false inferences to continue in his record. The Court of Appeals cannot infer that reference to this false and erroneous material is somehow less than a complete falsehood when reviewing the entire record. The case supporting Appellant is Codd v. Velger, 429 US 624. Nothing in our record is even suggestive that the material was accurate since it was a total error and to be rescinded. There has never been a finding by the Federal Court that any of the material contained accurate statements. The record on its face shows it to be entirely inaccurate, totally false, and none of the references should be in the record, let alone allowing the procedural violations to go on and on with its deliberate and blantant violations of the Policy and Procedure Manual, all being done to prevent public disclosure of the true events that took place under instruction

from City officials through the Chief.

The personnel file was allowed to contain falsehoods to bolster the City's defense in the Rhoton lawsuit. The former Chief, Russell Scott, stated in deposition he would not hire anyone with such a record; the former Prosecuting Attorney and Magistrate, Bryant Behrmann, stated in deposition a person faced with that existing record would be lucky to find a job at all, let alone in Law Enforcement; the Mayor confirmed that such a firing brands a person in Law Enforcement for life (testimony reflected in the Krause deposition); and conversation with Chief Priest reveals he and the City would prevent Puckett from work in Law Enforcement, (testimony in the Krause deposition).

The City officials prevented and discouraged Puckett from seeking release of his file. He was forced to decline requesting release as the false statements were totally stigmatizing, and without release there was no expectation of employment. The end result was clear; Puckett could not become gainfully employed in Law

Enforcement.

A firing, without opportunity of rebuttal and record protection, is devastating and establishes a permanent bases to prevent future employment. Puckett is entitled to the protection of a name clearing and a rebuttal to false and stigmatizing reasons as stated in his personnel file, all of which is vital to his liberty interests to avoid damage resulting from public dissemination or release of his record.

No information or material wrongfully entered in Puckett's file could be disseminated and should never be entered unless found to be true pursuant to a name clearing hearing as constitutionally mandated. The Policy and Procedure Manual also mandates the procedural protection of all officers with the City Police Department. The Court of Appeals failed to find the constitutional protection and failed to review the Manual filed in the District Court record.

> Question 2: Whether Officer Puckett was guaranteed procedural property rights and liberty interests

under the Policy and Procedure Manual used by the City, protecting him from falsehoods and entitling him to due process hearings.

Puckett had protected rights and interests under the City's Policy and Procedure Manual which was ignored by the City. There is no basis to dispute the Manual's existence, despite the City's effort to discredit their established creation and use of the document.

RECORD SUPPORTS USAGE OF MANUAL BY CITY

(a) Excerpt of Clerk's Record, page 44, Cl. Rec. Doc. #92, Answer to Cross-claim, ¶VIII, P. 2-3, the City states: "as required by the Procedure and Policy Manual of the City of Emmett, Idaho".

(b) The Department of Employment issued subpoena to Police Department to bring Manual to unemployment hearing August 22, 1980. (Cl. Rec. Doc. #150, Exhibit "I").

(c) The Manual was produced on August 22, 1980, pursuant to subpoena; (Cl. Rec. Doc. #150, Exhibit "A" and "B").

(d) Motion for Production of Documents directed to the City's Defense Carrier Counsel forced production of certified copy of the Manual on January 17, 1983, and placed in Court Record, (Cl. Rec. Doc. #150 Exhibit "M", Cl. Rec. Doc. #154 Exhibit "T").

(e) Reference to Manual by City, citing confidentiality of a Police Officer's personnel file. (Cl. Rec. Doc. #79, Chapter 9, §905, Designation item #5, P. 2, and Amended Designation item #10, P. 2).

(f) Reference by Emmett City Police Officers as to the customary usage of the Policy and Procedure Manual established by affidavits and depositions in the record.

The Manual delineates procedural prerequisites to be followed before any discipline or termination proceedings. None were ever followed in this matter. The City state in Reply to Puckett's Crossclaim (¶VIII, Page 2-3), that Puckett had not met the criteria and prerequisites for a hearing as specified in the Policy and Procedure Manual. That's not what the Manual says as the City attorney well knows. The City did not met the criteria necessary to fire Puckett in the first instance as the express provisions in Chapters 8 and 9 of the Manual provide precise language creating the property right and liberty interest:

a. If the Chief deems disciplinary action appropriate, he shall conduct interrogation, compile factual matters, related data and notify chairman of

Professional Standards Board. (Cl. Rec. Doc. #154, Exhibit "T" and #150, Exhibit "M", Chapter 8).

b. Board shall call meeting of members, make written evaluation of incident facts, call witnesses, examine evidence, investigate and schedule hearings, review and evaluate findings. (Cl. Rec. Doc. #154, Exhibit "T" and #150, Exhibit "M", Chapter 8).

c. Board shall produce Disposition Report of findings. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

d. Board shall submit Report to Chief for review. (Cl. Rec. Doc. #154, Exhibit "T" and #150, Exhibit "M", Chapter 8).

e. Board Report shall contain summary of circumstances concerning incident, Board's deliberations and Board's findings. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

f. Chief may disapprove findings, but once written approval of Report by Chief, copies of Report must be forwarded to Officer. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

g. Only after copy of Report given to Officer may Chief take steps to implement discipline. (Cl. Rec. Doc. #154, Exhibit "T", and #150 Exhibit "M", Chapter 8).

h. If Chief implements discipline from Report, Officer has right to appeal action on the record to Board of Appeals. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

The City failed to follow any required acts incumbant upon it to pursue. During the course of the civil rights action initiated by the Rhotons, Defense Counsel for the City filed documents containing reference to the false and wrongfully entered material in the personnel files, which was disseminated to the public, using this stigmatizing material as their defense to the Rhoton civil rights action. The personnel file was to be kept personal and confidential, and the City referred to that portion in the Manual, (Police Officers Bill of Rights, Chapter 9), as basis to refuse disclosure of Puckett's file contents after he filed his Crossclaim. The City refused disclosure in discovery proceedings and wanted Puckett to waive his rights under the Manual. The City's actions confirm their knowledge of its contents guaranteeing records and files to be kept confidential at the Police Department at all times.

The City violated Puckett's liberty rights created under the Manual by removing his personnel

file from the Police Department (where they are to be kept exclusively) and turned it over to defense counsel representing the City and Priest, to zero in on the falsifications of the disciplinary action and the false reasons for termination contained in the personnel record and used it as their defense. The City attempts to disquise their wrong by stating there was no convenant that copies could not be made and re-appear in the records after Officer Puckett filed his lawsuit. Priest states a copy of the disciplinary action was placed in Puckett's records for his personal reference. The City was on record through the formal investigation and subsequent correspondance that the disciplinary action was to be stricken from all records. The City's use of the disciplinary action came on January 22, 1981. Puckett never filed his claim until October 13, 1981. Clearly, the discipline did not appear after October 13, 1981, as it was referred to nine months earlier on January 22, 1981.



The action of the City was pursued maliciously and deliberately, well knowing the City had responsibilities stemming from the Manual, which did not include a law firm's right to possess confidential material. The law firm also knew and had that portion of the Manual in their possession dealing with Police Officers Bill of Rights, guaranteeing confidentiality of personnel records. All Defense Counsel, as well as the City officials, knew they were not to be turned over or kept by anyone other than the Police Department. Also, the record showed it was to be stricken by City Order, within six months, and furthermore was exonerated by the Findings and Conclusions of the official City investigation on September 29, 1980. Priest himself states in his deposition he turned Officer Puckett's file over to the City Attorney. The Court of Appeals failed to review the record and comment on the effect of the Manual. The Memorandum confirms no review occurred. The Court's review of the Manual would confirm the procedural property rights which require the

implementation of the procedural safeguards to prevent entry of false material in files initially. The Manual alone is sufficient basis to reverse the Court of Appeals and District Court decision. It must be remembered the District Court's decision had ruled there was no evidence in the record to show official City action in the wrongs committed upon Puckett. The Court of Appeals apparently had no difficulty finding City action, but went on to state there was no constitutionally protected property right or violation of a liberty interest, but reveals, in so stating, that the Court had not reviewed the record before rendering their decision.

> Question 3: Whether the use of Puckett's personnel file in Federal Court was privileged use; whether the City engaged in a lawful defense of the Rhoton lawsuit.

The Court of Appeals thought the use and dissemination of the information may be privileged, and the City had engaged in a lawful defense of the Rhoton civil rights action.

Puckett never initiated suit for libel or slander, and any argument that a privilege exists to allow a breach of the duty of confidentiality could hardly be said to be the pursuit of a lawful defense. The City creates a cause of action for malicious and wrongful release of information when attempting to defend the Rhoton civil rights claim. The disciplinary action was to be stricken by its own terms no later than February 20, 1980. Using it was an act of bad faith. It remained in Puckett's record even after the official investigation, contrary to its directives. It should have never existed in the first place since procedural mandates in the Manual were not followed. When the City failed to strike, Puckett caused the investigation to occur, the results of which fully exonerated him with the official Findings and Conclusions on September 29, 1980. The City agreed by its Findings to rescind all previous action and inferences.

The City knew a mistake had been made and

Puckett should never have been disciplined in the first instance. The City was not lawfully defending itself by leaving a copy of the disciplinary action in Puckett's files and the City violated Puckett's liberty interests by using the falsified material from the disciplinary action against him.

The decision to strike the disciplinary action was a policy decision of the City officials. They refused to carry out the policy, being in need of a defense, and elected to implement a policy to refuse to strike the action, violating the Manual mandates prohibiting discipline without hearings and review proceedings and violating his liberty interests as they knew the statements were totally false and would impune his reputation and stigmatize his character by the false statements.

Question 4: Whether the disseminated information was false and stigmatizing.

The disciplinary action had occurred, but the "information" from and about the disciplinary action was erroneous and false. The error was revealed, Puckett was exonerated and all inferences

were rescinded by the investigation. Puckett was exonerated on the subject matter long before the information was disseminated and publicized by the City, and it was the City who exonerated him and agreed to remove previous City action and inferences stemming from the event. Those clear facts as contained in the official investigation made part of the record, just as is the Manual in the record. Neither the District Court nor the Court of Appeals has ever entered Findings on the issue of truth or falsity, as there has never been a determination on the merits to assess the wrongs committed by the City. The record is clear, the discipline was wrong, and required all inferences be rescinded. The material in the files about the discipline is false in fact and gives a false impression by its mere reference.

Question 5: Whether the Court of Appeals erred in denying Puckett's Petition for Rehearing.

The issue presented to the Court of Appeals from the District Court appeal was whether Puckett showed an officially promulgated rule

or unofficial custom concerning his termination and the Court, upon Motion for Reconsideration, stated there was no official City policy, and sought to distinguish this case from McKinley v. City of Eloy, 705 F 2d 1110 (CA Idaho, 1983), by saying, "as the McKinley opinion makes clear, the City officials admitted that the personnel decisions of the City manager represented official City policy. There is no such admissions in the present case; in fact, the City of Emmett argues strongly that Chief Priest's action were not official City policy". We submit you will find nothing in the record anywhere that argues Priest's action were not official City action. That was the basic issue appealed to the Circuit Court of Appeals. The Appellate Court didn't even discuss the issue of City action, and instead went on to consider the property rights and liberty interests Puckett believed to have been violated.

The Court of Appeals said there was controverted evidence that a Policy and Procedure Manual existed at the time of Officer Puckett's

discharge, but the record gave no indication of its contents and it was impossible to determine whether the Manual created a protectable property interest. However the entire Manual was made part of the record in this case. After reading that statement in the Memorandum, Puckett did Petition for Rehearing, and directed the Court to the Designation and Docket Sheet of the Court to take the opportunity to review the Manual and render a decision from the record.

The Court of Appeals denied Puckett's Petition for Rehearing, without explanation, which it itself would suggest substantial error as the Court's original decision gave no consideration to Puckett's liberty interests or property rights under the Policy and Procedure Manual. The decision speaks as if no one checked the contents of the Manual, all of which was in the record and precisely referred to in the Petition for Rehearing. The Manual confirms the property rights, both on procedure and confid-

entiality. There must be hearings and reviews before discipline and there must be confidentiality of the contents of the personnel file. The Court of Appeals cannot assume the Manual doesn't exist; it was produced by the City after Puckett obtained a Court Order for its production; it was cited by the City as supporting their claim of confidentiality, and most importantly it was alleged to exist in the City's Reply to Puckett's Crossclaim.

As reflected in the arguments above, the Court of Appeals concluded the record is replete with evidence supporting official City action in the events that occurred. The Court, however, attempts to excuse the wrongful dissemination of confidential personnel information (established by the Policy and Procedure Manual) by its untenable reference to privileged communication and exception to libel and slander defamation under tort law. There can be no privilege to breach an established right to confidentiality that seeks to defend one cause of action by defaming the character of another with utter

falsehoods. Puckett is not suing for defamation of character under a libel tort theory, so there can be no kitigation defense of privilege exception. Puckett's claim is a civil rights violation under §1983, and the elements of libel or defenses to it has no application to the case. The matter of concern is to determine the property rights granting confidentiality, and the breach of that right and subsequent violation of his liberty interests by the placement of false, stigmatizing and defamatory material in his personnel file, and the perpetuation of the wrong in contradiction to the official investigation. That is the actionable cause, and is aggravated by the malicious conduct of the City through wrongful dissemination, publication and circulation of this false material, or portions of it, as the final insult to injury. Puckett's case deals with liberty interests and property rights violated by the placement and dissemination of false information in and from his personnel file, knowing it should not have been

there or left in the file after February 20, 1980, and absolutely not after September 29, 1980.

Officer Puckett filed suit seeking a form of injunctive relief, requesting restoration of his personnel file and reinstatement of his employment. He is entitled to job reinstatement with benefits and removal of the false and stigmatizing information of his personnel file. The Court of Appeals has disregarded a material and critical portion of the record in this case when rendering its initial decision and thereafter when it failed to address the Manual. Puckett's liberty rights and property interests under the Manual were disregarded, unfortunatly due to the Court's oversight of the Policy and Procedure Manual contained in the record. Puckett's Petition for Rehearing was denied without just cause or reason and no indication the Court had reviewed the Manual upon receiving the Petition and its important issue has thusly been left in limbo, since the Manual is an established policy that has been in custom and

usage by City officials in the regulation of matters dealing with disciplines, suspensions and terminations. The Manual creates confidentiality as an inalienable Bill of Rights; it certainly would be a property right that cannot be abridged, especially where the safeguards mandated by due process procedural hearings, designed especially to prevent entry of false information into the personnel files, is deliberately avoided to prevent official disclosure of official Police Department involvement in matters made the subject of a Federal suit as it was here. Clearly, when the Rhotons filed suit in April, 1980, that lawsuit would certainly have been fueled further had disclosure of events forthcoming from official Review Board hearings and their recommendations when the facts revealed the Chief had conferred with Puckett and instructed him to do as he had done, acting within the scope and course of his employment. Obviously the Chief of Police would suffer directly from that, and being a direct appointee of the City Mayor, the Mayor would suffe

directly through his active participation in the efforts to conceal the true effects that occurred.

The record is clear from the evidence presented that the Manual was in effect through official City use as the customary regulation and procedural processing of disciplinary matters and termination proceedings. Such customary usage of established policy created the property right and liberty interest, a categor created in addition to that constitutionally established under the due process clause of the 14th Amendment. The Court of Appeals, it appears to us, has decided the question of property rights and liberty interests in a fashion that it is in conflict with applicable decisions of this Court in Codd v. Velger, particularly since the information in the personnel file is clearly false and improperly placed and maintained there, and would never had been there but for denial of due process hearings in the first instance. The information is false, not only in fact, but also by virtue of the false impressions it leaves

with the placement in the file, and the stigmatization of such false information is a violation of liberty rights in preventing future employment.

It appears the Federal Court system thus far is attempting to shield the small community of Emmett, Idaho from the right to relief that a City Police Officer is entitled to receive with the wrongs imposed upon him as the Court prefers to assume the City was attempting to resolve an existing problem and not meaning to create another problem more devastating than the first. From hind site, the City of Emmett has no doubt discovered better ways to defend civil rights actions than by destroying Police Officer's reputations. Officer Puckett in the meantime should not be denied the relief and redress to which he is entitled by law.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Vernon K. Smith, Counsel
for Petitioner
1900 Main Street
Boise, Idaho 83702
Phone: (208) 345-1125

Vernon K. Smith
Counsel of Record
1900 Main Street
Boise, Idaho 83702
Phone: (208) 345-1125

_____, 1985

CERTIFICATE OF SERVICE

I, Vernon K. Smith, attorney for Royal Von Puckett, Appellant-Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on ____day of _____, 1985, I served a copy of the foregoing Writ of Certiorari on City of Emmett, Appellee-Respondent herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Louie Gorrono, Esq., Attorney of record for Appellee-Respondent at P. O. Box 637, Emmett, Idaho, 83617.

_____
Vernon K. Smith
Attorney for Appellant-
Petitioner

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUDREY RHOTON and JOHN RHOTON, Individually, and JOHN RHOTON, Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor, Plaintiffs, vs. ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO, Defendants,	FILED SEPTEMBER 28, 1983 No. 83-4112 DC# CV 80-1113 MJC
ROYAL VON PUCKETT, Cross-claimant/Appellant, vs. THE CITY OF EMMETT, IDAHO, Cross-defendant/Appellee.	M E M O R A N - D U M*

Appeal from the United States District Court
for the District of Idaho
Chief Judge Marion J. Callister, Presiding

(Argued and Submitted September 4, 1984)

Before: WRIGHT, PREGERSON, and CANBY, Circuit Judges.

* Per Ninth Circuit Rule 21, this disposition is not intended for publication and may not be cited as precedent in this circuit.

Royal Von Puckett (Puckett), a former police officer for the City of Emmett, Idaho, has sued the city pursuant to 42 U.S.C. § 1983 for violations of his Fourteenth Amendment rights in connection with his discharge from the city's employ and the release of information in his personnel file. He appeals the district court's decision granting summary judgment to the city.

Summary judgment is appropriate only if there is no genuine issue of material fact, or, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law. Smith v. Gross, 604 F2d 639, 641 (9th Cir. 1979) (per curiam).

In order for Puckett to prevail, he must show that (1) he was deprived of a constitutionally protected property or liberty right, and (2) the deprivation resulted from the implementation of a policy statement, regulation, official decision or custom of the city's officials. Monell v. Department of Social Services, 436 U.S.

658, 690-91 (1978).

We need not address whether the evidence presented by Puckett supports the second element of his claim, as he has presented no evidence to support a find that he was deprived of any constitutionally protected right. The Constitution does not itself create a liberty or property interest in continued employment by a police officer who has completed a probationary term. Bishop v. Wood, 426 U.S. 341 (1976). The burden is on the appellant to show that this interest was created by state law, contract, or other existing rules or understandings. Id. at 344-45; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

A. Property Interests

Puckett asserts that he has a property interest in continued employment because (1) he completed an initial six month probationary period and (2) the police department must follow procedures of a police department Police and Procedure Manual.

The Idaho Supreme Court has held that a police chief's tenure is a protectable property interest when a city charter provision provides tenure for a specified term. Buckalew v. City of Grangeville, 97 Idaho 168, 540 P.2d 1347 (1975). Puckett has not alleged that his employment term was specified, or that his discharge from employment was not within the sole discretion of the Chief of Police.

Puckett incorrectly cites Loebeck v. Idaho State Board of Education, 96 Idaho 459, 530 P.2d 1149 (1975) for the proposition that once an employee has completed a probationary period, he or she has a legitimate entitlement to tenure and a vested property interest. Loebeck states merely that the hope of receiving tenure, even after several years of employment, does not create a property interest. Id at 1151. Puckett had neither tenure nor any statutory or regulatory grounds on which to base a protectable property interest in continued employment.

There is some, albeit highly controverted, evidence that a Policy and Procedure

Manual existed at the time of Puckett's discharge. However, the record gives no indication of its contents. It is impossible to determine whether the manual created a protectable property interest, or if Puckett fulfilled its requirements for a hearing. His bald statements that the manual created a property interest cannot defeat the summary judgment.

B. Liberty Interests

Puckett asserts that his liberty interests were violated by the disciplinary action, probation, suspension and termination, and public announcement of his personnel file and records. The Supreme Court has held that even if an employee is wrongfully discharged, the discharge itself is not a violation of liberty interests. Bishop v. Wood, 426 U.S. 341, 347-49 (1976). Therefore, the disciplinary action, probation, and termination of Puckett are not in themselves violations of his liberty interests.

The dissemination of information regarding appellant's discharge in the context of the Rhoton lawsuit did not violate Puckett's

liberty interests. No violation of a liberty interest occurs in the dissemination of stigmatizing information unless the information is false. Codd v. Velger, 429 U.S. 624, 627-28 (1977).

According to Puckett, the city disclosed that he had been disciplined in connection with the arrest of the Rhotons. Although Puckett may have been exonerated under the settlement agreement with the city, the fact of the disciplinary action is undisputed. Breach of the settlement agreement is not an issue before this Court.

The dissemination of this information may also be privileged. Relevant statements made during judicial proceedings cannot be the subject of a libel suit because freedom of expression of participants outweighs the importance of individual reputations. 50 Am Jur 2d, Libel & Slander § 231; see e.g., Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419, 421 (3d Cir. 1966). That privilege

may also be relevant here. Puckett has not shown that the city had any official policy or plan to violate his protected liberty interests. It was merely engaged in the lawful defense of the Rhoton lawsuit.

Puckett has produced no evidence to substantiate a claim that his property or liberty interests have been violated. The city was entitled to summary judgment.

We do not address whether Puckett has a state law remedy for breach of contract against the City of Emmett.

Affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AUDREY RHOTON, et al, Plaintiffs, -vs- ROYAL VON PUCKETT, et al, Defendants.	FILED MAY 2, 1983 Civil No. 80-1113 MEMORANDUM DECISION
ROYAL VON PUCKETT, Crossclaimant, -vs- THE CITY OF EMMETT, IDAHO, Crossdefendant.	

This action was brought by David and Audrey Rhoton under 42 U.S.C. § 1983 for damages suffered when they were allegedly improperly arrested by an Emmett City policy (sic) officer, Royal Von Puckett. After this suit was filed, Puckett was fired from the Emmett City Police Department. Puckett thereafter filed a crossclaim against the City of Emmett claiming that his dismissal

violated his due process rights. The Court has been informed that the parties have settled the Rhotons' action and all that remains is Puckett's crossclaim. Both Puckett and the City of Emmett have filed motions for summary judgment and participated in oral argument before the Court. The Court will now rule on those cross-motions for summary judgment. In so ruling, the Court will follow the standard set out in Fed.R.Civ.P. 56(c) that summary judgment will only be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

This dispute began on April 10, 1979, when Officer Puckett arrested the Rhotons for driving with expired license plates and obstructing a police officer. These charges were dismissed on July 24, 1979, upon motion by the Emmett City Attorney. Apparently frustrated with the Emmett City Attorney, Puckett obtained an arrest warrant from the Gem County Prosecutor. Some time later, the Rhotons were re-arrested on the same charges that were earlier dismissed.

Before the Rhotons filed this action claiming that their re-arrest was improper, Puckett met with the City Mayor, Chief of Police Russ Scott, and Police Lieutenant Mike Priest. See Puckett's affidavit, pp. 13-14. Puckett alleges that "the Mayor stated that he wanted me fired immediately because of the Rhoton matter . . . ." See Puckett's affidavit, p. 13. Police Chief Scott then interceded and stated that he would place Puckett on probation for six monthss because of the Rhoton matter. See Puckett's affidavit, p. 14.

Shortly thereafter, on April 17, 1980, the Rhotons filed this action. Mike Priest had been promoted to the position of Emmett City Chief of Police and he told Puckett that "(Puckett's) actions and statements were jeopardizing (Priest's) job, that (Puckett) was toying with (Priest's) bread and butter . . . ." See Puckett's affidavit, p. 21. Priest also indicated that the Mayor and City Council wanted Puckett fired. Priest demanded that Puckett resign, but Puckett refused.

On June 2, 1980, Priest fired Puckett for "gross insubordination." Puckett received no prior notice of, or hearing on, his termination.

Puckett filed his crossclaim against the City of Emmett alleging that his due process rights had been violated when he was terminated without a hearing. Puckett's crossclaim alleges a violation of "Title 42, Chapter 21" and does not cite any specific statute. This is, of course, a very broad claim that encompasses all the civil rights statutes. In construing the crossclaim liberally, the Court finds that it only states a claim under 42 U.S.C. § 1983 for deprivation of due process rights under color of state law.

No suit may be maintained against a city under § 1983 unless that city is a "person" as defined by the United States Supreme Court in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978). Monell held that

> (1) local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance,

> regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a a (sic) government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even through the body's official decision-making channels. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Id. at 690.

Thus, Puckett must show that the City of Emmett executed or implemented an officially-adopted policy statement or rule, or, if no officially-promulgated rules can be found, engaged in a permanent and well-settled custom which resulted in Puckett's termination. The record is devoid of any evidence of an officially-promulgated rule or unofficial custom concerning Puckett's termination. Puckett argues that the Mayor and City Council wanted him fired. There is no evidence in the record to indicate that the City Council did discuss the incidents

surrounding the re-arrest of the Rhotons, but there is no evidence in the record of any official mayorial or city council action leading to Puckett's termination. In fact, all the evidence in the record indicates that Puckett's termination was an isolated incident triggered by personality conflicts. Puckett's own crossclaim supports this conclusion:

> That said Crossclaimant was fired by said Chief of Police, Mike Priest, for his own personal reasons and as a personal vendetta which was ultimately documented in the record as said termination purportedly occurred for the reason that Crossclaimant was unable to follow orders and instructions, possessed a poor attitude towards the public, was unable to absorb and follow Department regulations and for gross insubordination....
>
> ....
>
> That said firing of Crossclaimant was the result of a desperate act for personal reasons by said Priest so as to save his own employment from embarrassment and termination, as he had lied to the Mayor of the City of Emmett, Rod Morgan, about matters relating to the arrest and subsequent events involving Audrey Rhoton and David Rhoton, the original Plaintiffs in this action . . . .

See Puckett's counterclaim, pp, 5,7.

By these allegations, Puckett is arguing

that the City is liable because its Chief of Police had a personal vendetta against Puckett. These allegations, combined with Puckett's failure to show an officially promulgated rule or unofficial custom concerning his termination, reduced Puckett's claim against the City to one based on a respondeat superior theory. The Monell decision specifically holds that municipalities cannot be sued under § 1983 on a respondeat superior theory.

Under these circumstances the Court finds that there are no genuine issues of fact on the question of whether the City of Emmett is a "person" under § 1983. Because crossclaimant Royal Von Puckett has failed to show an officially promulgated rule or unofficial custom concerning his termination, the Court must therefore grant the motion for summary judgment filed by cross-defendant City of Emmett and deny the motion for summary judgment filed by crossclaimant Royal Von Puckett.

DATED this 29th day of April, 1983.

MARION J. CALLISTER,
CHIEF JUDGE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AUDREY RHOTON, et al, Plaintiffs, -vs- ROYAL VON PUCKETT, et al, Defendants.	FILED MAY 2, 1983 Civil No. 80-1113 ORDER AND JUDGMENT
ROYAL VON PUCKETT, Crossclaimant, -vs- THE CITY OF EMMETT, IDAHO, Crossdefendant.	

The Court has reviewed the entire record in this matter and heard oral argument concerning the cross-motions for summary judgment filed by crossclaimant Royal Von Puckett and crossdefendant City of Emmett, Idaho. In accordance with the views expressed in the memorandum decision filed with this order and judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that the motion for summary judgment filed by crossdefendant City of Emmett, Idaho, be and the same is hereby, GRANTED, and that the cross-motion for summary judgment filed by crossclaimant Royal Von Puckett be, and the same is hereby, DENIED.

DATED this 29th day of April, 1983.

MARION J. CALLISTER,
CHIEF JUDGE UNITED
STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AUDREY RHOTON and JOHN RHOTON, Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor,	FILED AUGUST 12, 1983
Plaintiffs,	
-vs-	Civil No. 80-1113
ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO,	MEMORANDUM DECISION
Defendants.	
ROYAL VON PUCKETT,	
Crossclaimant,	
-vs-	
THE CITY OF EMMETT, IDAHO,	
Crossdefendants.	

Before the Court is a motion to reconsider filed by crossclaimant Royal Von Puckett. On May 2, 1983, this Court dismissed Puckett's cross-claim against the City of Emmett on the ground that there was no evidence of an officially-

adopted rule or City policy concerning Puckett's termination. In that decision the Court was relying upon its interpretation of the case of Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978). In Monell, the Supreme Court held that cities can only be sued under 42 U.S.C. § 1983 where the plaintiff shows that the conduct alleged to be unconstitutional implements an officially-adopted city rule or policy.

The Court, doing its own research, now discovers that on May 9, 1983, six days after this Court filed its decision, the Ninth Circuit handed down a ruling concerning the issues in this case. In McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), the Ninth Circuit was faced with a police officer's § 1983 claim that the City of Eloy had violated his constitutional rights by firing him. The city claimed that the officer was fired because of his use of excessive force in arrests. The officer claimed he was fired because of his union activities. The city moved to dismiss the suit on the ground

that there was no officially-adopted city rule or policy leading to the officer's termination. The district court disagreed and the Ninth Circuit affirmed stating:

> The City of Eloy is governed by an elected city council that includes the mayor and vice-mayor. The council is charged with making city policy, promulgating rules and regulations for personnel and the appointment of the city manager and the policy chief. The city manager is vested with ultimate responsibility for the hiring, firing, and management of city employees. It was City Manager Fuller who dismissed plaintiff after consulting with the mayor, vice-mayor, and police chief.
>
> Where a city official alone is the final authority or ultimate repository of power, "his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the municipality may be held responsible under section 1983."

This sweeping holding was, however, dicta. As the McKinley opinion makes clear, the city officials "admitted that the personnel decisions of the city manager represented 'official city policy.'" Id. at 1116. There is no such admission in the present case; in fact, the City

of Emmett argues strongly that Chief Priest's actions were not official city policy.

The Court will therefore decline to follow the McKinley decision on the ground that the present case is distinguishable from McKinley. The Court has examined Puckett's affidavit filed May 12, 1983, and the affidavit of Jon Wyman, filed May 11, 1983. The Court finds nothing in those affidavits, or in any other part of the record, to cause it to change its memorandum decision filed May 2, 1983. Therefore, the Court will deny Puckett's motion to reconsider.

DATED this 8th day of August, 1983.

MARION J. CALLISTER, CHIEF
JUDGE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

AUDREY RHOTON and JOHN RHOTON, Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor,	FILED AUGUST 12, 1983
Plaintiffs,	
-vs-	Civil No. 80-1113
ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO,	O R D E R
Defendants.	
ROYAL VON PUCKETT,	
Crossclaimant,	
-vs-	
THE CITY OF EMMETT, IDAHO,	
Crossdefendants.	

The Court has reviewed the entire record in this matter concerning crossclaimant's motion to reconsider. In accordance with the views expressed in the memorandum decision filed with this order,

IT IS HEREBY ORDERED that crossclaimant's motion to reconsider be, and the same is hereby, DENIED.

DATED this 8th day of August, 1983.

MARION J. CALLISTER, CHIEF
JUDGE UNITED STATES
DISTRICT COURT

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED NOVEMBE
19, 1984

AUDREY RHOTON and JOHN RHOTON Individually, and JOHN RHOTON, Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor
Plaintiffs,

vs.

ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO,
Defendants,

ROYAL VON PUCKETT,
Cross-claimant,
Appellant,

vs.

THE CITY OF EMMETT, IDAHO,
Cross-defendant
Appellee.

No. 83-41

DC CV
80-1113
MJC

APPEAL from the United States District Court for the Boise District of Idaho.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Boise District of Idaho and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 28, 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED NOVEMBER 05, 1984

AUDREY RHOTON and JOHN RHOTON, Individually, and JOHN RHOTON Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor,

Plaintiffs,

vs.

ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO,

Defendants.

NO. 83-4112

DC# CV 80-1113 MJC

O R D E R

ROYAL VON PUCKETT,

Crossclaimant/Appellant,

vs.

THE CITY OF EMMETT, IDAHO,

Crossdefendant/Appellee.

Before: WRIGHT, PREGERSON, and CANBY, Circuit Judges.

The Petition for Rehearing, filed on October 10, 1984, has been considered and is denied.

VERNON K. SMITH
Attorney at Law
1900 Main Street
Boise, Idaho 83702
(208) 345-1125

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

o0o

AUDREY RHOTON and JOHN RHOTON Individually, and JOHN RHOTON Guardian Ad Litem and natural father of DAVID R. RHOTON, a minor,	FILED OCTOBER 10, 1984
Plaintiffs,	No 83-4112
vs.	DC# CV 80-1113 MJC
ROYAL VON PUCKETT; MIKE PRIEST; GEM COUNTY, IDAHO; and THE CITY OF EMMETT, IDAHO,	PETITION FOR REHEARING PURSUANT TO RULE 40, F.R.A.
Defendants.	
ROYAL VON PUCKETT,	
Crossclaimant/Appellant,	
vs.	
THE CITY OF EMMETT, IDAHO,	
Crossdefendant/Appellee.	

o0o

PETITION FOR REHEARING

TO: THE CLERK OF THE COURT, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

COMES NOW The Appellant, Royal Von Puckett, through his attorney, Vernon K. Smith, and Petitions the Appellate Court for rehearing, pursuant to Rule 40, F.R.A.P.

In Counsel's opinion, the Court has overlooked a material fact and point of law in their decision; and this Petition is submitted and aimed at directing the Court's attention to the relevant parts in the record and again consider the Law. Appellant's counsel does herewith state that in Counsel's judgment, from reviewing the record, material facts on the Manual contents has been overlooked and the law has not been applied as the law would require:

I

ENTIRE CONTENTS OF THE POLICY AND PROCEDURE MANUAL IN THE RECORD

The Court said, "The record gives no indication of the Manual contents and it could not determine whether the Manual created a protect-

able interest, or if Puckett fulfilled its requirements for a hearing," Memo Dec., P. 4, L. 4-9

The record contains the entire Policy and Procedure Manual, in full context, Cl. Rec. Doc. #154, Exhibit "T", as well as relevant portions cited in Puckett's Affidavit, Cl. Rec. Doc. #150, Exhibit "M" and by Memorandum reference from the City's defense carrier's Counsel, Cl. Rec. Doc. #79 attachment thereto.

For reference see:

1. Cl. Rec. Doc. #154, entitled "statement of attachment of Policy and Procedure Manual to the Affidavit of Royal Von Puckett to be included therein as Exhibit "T" as the total Manual. #154 was filed February 17, 1983, contains the entire Manual, table of contents, text material consisting of 75 pages, submitted under Affidavit of Royal Von Puckett. The Manual was produced by Kathy Sticklen, City's Defense Carrier Counsel on the 17th day of January, 1983, and submitted by Affidavit of the record.

2. Appellant's Designation filed March 30, 1984, item #20 P. 2, and Appellant's Amended Designation filed April 2, 1984, item #29, P. 3.

3. The precise section on discipline, Chapter 8 of the Manual, is found in Cl. Rec. Doc. #150, Exhibit "M", included in the Designation as item #17, P. 2, and Amended Designation as item #25, P. 3.

4. Reference to the confidentiality of the personnel file Chapter 9 of Manual was cited by the City's Defense Carrier Counsel, Cl. Rec. Doc. #79, included in the Designation as item #5, P. 2, and Amended Designation as item #10, P. 2.

II

RECORD SUPPORTS USAGE OF MANUAL BY CITY

(a) Excerpt of Clerk's Record, page 44, Cl. Rec. Doc. #92, Answer to Crossclaim, ¶ VIII, P.2-3, the City states: "as required by the Procedure and Policy Manual of the City of Emmett, Idaho."

(b) The Department of Employment issued subpoena to Police Department to bring Manual to unemployment hearing August 22, 1980. (Cl. Rec. Doc. #150, Exhibit "I").

(c) The Manual was produced on August 22, 1980, pursuant to subpoena; Puckett became aware of the Manual from statements made by Chief (Cl. Rec. Doc. #150, Exhibit "A" and "B").

(d) The motion by Puckett for Production of Documents directed to Kathy Sticklen, City's Defense Carrier Counsel forced production

of certified copy of Manual on January 17, 1983 and placed in Court Record (Cl. Rec. Doc. #150, Exhibit "M", Cl. Rec. Doc. #154, Exhibit "T").

(e) Reference to Manual by City, citing confidentiality of a Police Officer's personnel file. (Cl. Rec. Doc. #79,Chapter 9, §905; Designation item #5, P. 2, and Amended Designation item #10, P. 2).

III

MANUAL CREATES THE PROPERTY RIGHT AND LIBERTY INTERESTS

The express provisions in Chapters 8 and 9 of the Manual provide precise language creating property rights and liberty interests:

a. If Chief deems disciplinary action appropriate, he shall conduct interrogation, compile factual, matters related data and notify chairman of Professional Standards Board. (Cl. Rec. Doc. #154, Exhibit "T", and #150 Exhibit "M", Chapter 8).

b. Board shall call meeting of members, make written evaluation of incident facts, call witnesses, examine evidence, investigate and schedule hearings, review and evaluate findings. (Cl. Rec. Doc. #154, Exhibit "T" and #150, Exhibit "M", Chapter 8).

c. Board shall produce Disposition Report of findings. (Cl. Rec. Doc.

#154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

d. Board shall submit Report to Chief for review. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

e. Board Report shall contain a summary of circumstances concerning incident, Board's deliberations and Board's findings.(Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

f. Chief may disapprove findings, but once written approval of Report by Chief, copies of Report must be forwarded to Officer. (Cl. Rec. Doc. #154, Exhibit "T" and #150 Exhibit "M", Chapter8).

g. Only after copy of Report given to Officer may Chief take steps to implement discipline. (Cl. Rec. Doc. #154, Exhibit "T", and #150, Exhibit "M", Chapter 8).

h. If Chief implements discipline from Report, Officer has right to appeal action on the record to Board of Appeals. (Cl. Rec. Doc. #154, Exhibit "T" and #150, Exhibit "M", Ch.8).

The Manual intends to create a property right and vigilantly safeguards it. As there shall be no discipline until (1) investigation, (2) notify Board Chairman, (3) convene Board, (4) schedule hearings, (5) produce record with

Disposition Report, (6) Chief review findings of Board, (7) reject or approve Report, with copy to Officer, (8) and only after Officer has reviewed Report may discipline take place.

The Manual requires steps of due process, through formal hearings, reviews and opportunities to respond before discipline can be entered. The Officer cannot be fired by the Chief at will, but only after recommendation by the Board and notification to the Officer.

The Manual creates a liberty interest by the clear requirement and expectation of absolute confidentiality of the personnel file of the Officer (Chapter 9, §905, P. 69 of Manual; Cl. Rec. Doc. #154, Exhibit "T", Cl. Rec. Doc. #79).

Only administrative and authorized personnel shall have access to such files; the original personnel file shall not be removed from the immediate office where stored; precautions shall be taken to insure security and confidentiality of such files, when information adverse to the Officer is place(sic) in his file, he shall be so informed and provided with a complete and

accurate copy of said information; he shall sign his name and date the adverse instrument, in recognition he has reviewed it, and only then may adverse instrument be placed in his personnel file. See Manual, Cl. Rec. Doc. #154, Exhibit "T", Ch. 9, §905, P. 69; Cl. Rec. Doc. #79.

The Officer shall have 30 days to respond to adverse comments and instruments entered in his file, and his response shall accompany the comment on a permanent basis. See Manual, Cl. Rec. Doc. #154, Exhibit "T", Ch. 9, §905,P. 69; Cl. Rec. Doc. #79.

IV

VIOLATIONS OF PROPERTY RIGHTS AND LIBERTY INTERESTS

Puckett's rights were violated in reviewing the Manual, as there was:

a. No convening of Professional Standards Board before termination.

b. No hearings before termination.

c. No reviews before termination.

d. No Disposition Report before termination.

e. No Report review before termination.

f. No Report approval before termination.

g. No review of Report by Puckett for comments before termination.

h. No proper placement of adverse comments in file.

i. No notification of adverse information to Puckett.

j. No signing or dating on instruments by Puckett.

k. No opportunity to respond.

l. No Report to create record to appeal.

m. Wrongful removal of personnel file from Police Department.

n. Wrongful delivery of the personnel file by Chief to City's Defense Carrier Counsel for use, (See Priest Deposition, Vol. II, P. 26, L. 4-8).

o. Manual does not support privilege defense upon releasing confidential information regardless of litigation proceedings. Manual establishes the expectation and right of confidentiality, a property right created by the Manual to protect Puckett's liberty rights.

p. File must stay in Department only. Priest says, "the probation period was completed satisfactorily by Roy and from this date will be stricken from his record." (See letter, February, 1980, Cl. Rec. Doc. #150, Exhibit "H"). Priest wrongfully decides, "The probation letter and this letter of completion of probation will be kept in Roy's personnell (sic) file for my private information only". (Cl.

Rec. Doc.#150, Exhibit "H"). That decision violates the requirement of §905, Ch. 9, P. 69 of Manual.

V

CONTINUING DENIAL OF OPPORTUNITY TO RESPOND AND FAILURE TO RESTORE FILE BY DELETION

Before and after Puckett was wrongfully terminated, he received no opportunity to defend his involvement in the Rhoton matter and experienced placement of misstatements of fact in his personnel file. Without a hearing he could not defend himself. Without a hearing he could not defend himself. Without a Report he had no record to appeal. He discovered these violations on August 22, 1980, when he received his rights from the Manual.

To remind the City of its obligation to him, Puckett sent correspondence to Council members, demanding official investigation. That was then done by City officials who reported through the City attorney in writing on September 29, 1980. (Cl. Rec. Doc. #150, Exhibit "R"). Puckett was exonerated of any wrongdoing by the investigation, but nothing was done to restore his personnel

file or restore the damage caused by the falsehoods entered in his file or even seek to restore his record by deletion. The City's policy was to pursue their defense of the Rhoton case, well knowing the wrongful placement of material in his file, the false and factual misstatements, and the violation of his property right in the termination. The City declines the opportunity to correct its wrong and instead allows its officials to take the confindential (sic) documents, false in content, and distribute the contents to the City Defense Carrier Counsel for use in Court. It's not just libel,to which privilege may be a defense; it is a violation and breach of confidentiality, which right is created by the Manual; it's the wrongfully placed material publicly disclosed without pre-placement opportunity and right to respond that violates his liberty interests.

Codd v. Velger, 429 US 624, says there exists the right of an employee to have the opportunity to clear his name. The Court must remember all items [illegible] in Puckett's personnel

file were without his knowledge, approval, or opportunity to respond. There were no hearings, no procedures followed as outlined in the Manual, no reports, no investigations, no review of deliberations or findings, no Board determination for review by the Chief or copies given to Puckett as a prerequisite to appeal; there is no practical appeal right because of the total denials.

The issue of "substantial accuracy" is a clear issue here as we have no investigation, hearings, board deliberations, reports, recommendations, or findings. The 17 reasons for termination are not substantiated by procedural mandates and no prerequisite safeguards are administered as required.

Under Board of Regents v. Roth, 408 US 564, an employee is entitled to a pretermination hearing. Not only is it required by Roth, but also by the Manual. The Manual was violated from all procedural standpoints, from the placement of information in the file, to the wrongful release of confidential information, well

knowing not one of the procedural mandates for placement of adverse comments or information were ever met.

The Law is clear on the need for pretermination hearings, It's to avoid mistake of fact on the important subject of an employee's future. The damage resulting from false material placed wrongfully in one's file is overwhelming and a total impart.

Chief Scott (Chief until October, 1979) states that, if he had not known the discipline was in error, a total mistake, and actually others instead of Puckett should have been disciplined, (Scott Deposition, P. 24-36, Cl. Rec. Doc. Sheet dated May 3, 1983), he would never hire him with the personnel file like Puckett's is now. (Scott Deposition, P. 29, L. 14; P. 28, L. 21).

It is this procedure that provides the difference between rule by law and rule by caprice. Most provisions in the Bill of Rights assert an aspect of procedure, and strict procedural safeguards is our only assurance for equal justice under tne law. See Anti-Fascist

Committee v. McGrath, 341 US 123, 179, 95 L. Ed. 817, 71 S. Ct. 624.

The Manual in the Police Department creates the rights, and the Court must apply the Law to protect these rights mandated by the Manual. We believe the Roth case plainly states the constitution mandates a "full prior hearing", (408 US 564 at 574) and no stigma may be imposed without a full prior hearing.

If the name-clearing hearing is the only right mandated by the constitution, as stressed by the majority opinion in Codd v. Velger, supra, then the "opportunity to refute the charge" as quoted from the Roth case, 408 US at 573, requires enforcement of the strict procedural mandates of the Manaul in order to have formal findings to refute. The clear purpose of the Manual is to determine from an investigation, review and Board recommendations, whether the charge warrants discharge. The Board considers the truth or falsity of the charge and what recommendations should flow from that. The Board recommendation

and Report findings establish the truth or falsity of the charge and whether a finding of discharge would be warranted under the circumstances. The Report provides the Chief with a basis to consider what action the Board recommends is warranted from the facts. The constitution requires that procedural safeguards be observed. Groppi v. Leslie, 404 US 496 at 503, 30 L. Ed. 2d 632, 92 S. Ct. 582. The Manual addresses these points of name-clearing, fact finding, confidentiality and response to comments and opportunities to refute the change with such clarity that deprevation of this right and liberty would be unjust. The Manual confirms the right to clear your name, refute the change and the right to a finding and Report whether the charges warrant dismissal. Something from which to appeal, it also safeguards the record with assurance of confinentiality (sic) and right to respond to establish a full-sided description of the events.

All these rights were blatantly denied, and the deprivation of liberty which this Court

must safeguard.

This Petition for Rehearing is respectfully submitted this 10 day of October, 1984.

Vernon K. Smith
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 10 day of October, 1984, I mailed a true and correct copy of Appellant's Petition for Rehearing to the following person at the following address by depositing a copy thereof in the United States Mail, postage prepaid.

Lou Gorrono
Attorney at Law
P.O. Box 637
Emmett, Idaho 83617

Vernon K. Smith
Attorney for Appellant